IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2005-0139
	)	2 CA-CR 2005-0195
Appellee,	)	(Consolidated)
	)	DEPARTMENT B
v.	)	
	)	MEMORANDUM DECISION
MARK FILLMORE CHISHOLM,	)	Not for Publication
	)	Rule 111, Rules of
Appellant.	)	the Supreme Court
	)	

APPEALS FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20021306 and CR20030293 (Consolidated)

Honorable Christopher Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann
Tucson
Attorneys for Appellee

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By Paul Gattone
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a bench trial, the court found appellant Mark Chisholm guilty of two counts of fraud in insolvency and one count of conspiracy to commit theft, perjury, and fraud in insolvency. The court suspended the imposition of sentence and placed Chisholm on concurrent probation terms of seven years for conspiracy and three years for each fraud conviction. He argues the state presented insufficient evidence to support his convictions. Because we find the state presented sufficient evidence from which the court could find Chisholm guilty on all counts, we affirm his convictions and resulting terms of probation.

BACKGROUND

¶2 We state the facts in the light most favorable to sustaining the convictions. *See State v. Sabin*, 213 Ariz. 586, ¶ 2, 146 P.3d 577, 580 (App. 2006). Chisholm and his wife Maryanne were the officers, directors, and primary shareholders of Safari Media, Incorporated. In 1999, the Securities Division of the Arizona Corporation Commission (ACC) began investigating the Chisholms and Safari for securities fraud. As a result of that investigation, the ACC filed a cease and desist order in November 1999 to prevent Safari from selling its stock.

¶3 In early 2000, Mark Chisholm purchased a house in Tempe as his sole and separate property and paid for it with funds from Safari accounts. In the months that followed, the Chisholms bought three paintings from a Beverly Hills art gallery using Mark's personal American Express card. An accountant with the ACC, who had examined the Chisholms' personal bank account records for January 1998 to April 2001, testified at trial

that, during that time, the Chisholms had charged over $7 million to Mark's personal American Express card and that they had paid over $4 million back into the account. Virtually all of the $4 million paid back into the account came either directly or indirectly from Safari accounts. Their former attorney testified it was "difficult, if not impossible, to distinguish between Mark and Maryanne the individuals and Mark and Maryanne the officers, directors, and principal majority shareholders in Safari Media."

Receivership and Related Orders

¶4 In June 2000, the Maricopa County Superior Court issued an order appointing a receiver for Safari—who was authorized to take possession of Safari's assets and records—to prevent the corporation's records from being destroyed and its assets from being liquidated to the detriment of its investors. In that order, the Chisholms were required to immediately "deliver" to the receiver "all funds, assets, property owned beneficially or otherwise, and all other assets, wherever situated." The court simultaneously issued a temporary restraining order prohibiting the Chisholms from, *inter alia*, "concealing, conveying, liquidating, or otherwise disposing of any assets, funds, or property owned, controlled or in the possession of Maryanne Chisholm and/or Mark Fillmore Chisholm." The court eventually superseded the restraining order with a preliminary injunction containing the same provision.

¶5 The same day the court appointed a receiver and issued the restraining order, police officers executed the receivership order at the Chisholms' home office in order to

search for and seize Safari's assets and records. An attorney with the law firm representing the Chisholms arrived with copies of the order while it was being executed. After speaking with the receiver, the attorney agreed to explain the order to the Chisholms in detail "that they could not transfer, assign, move, take any of their assets, [or] any Safari Media assets." Thereafter, the attorney explained to the Chisholms that the orders were very broad and entitled the receiver to take everything out of the house. He explained that he had "struck a deal" with the receiver not to empty the house on the condition the Chisholms not remove anything from the house. He reiterated they could not "take anything . . . hide anything . . . move anything . . . access bank accounts . . . [or] touch anything there is."

¶6 After the receiver had the Chisholms' home office searched, the Chisholms' attorney responded to their inquiries about the receivership and explained "the receiver could take all of the property that the receiver believed . . . was the property of Safari Media and that [they] could not dispose of assets that were the subject of the [restraining order]." On July 11, the Chisholms again met with their attorneys for further explanation of the receivership, the restraining order, and the preliminary injunction that had since been entered. At that time, their attorney emphasized "all of their assets . . . were now encumbered to the extent that they could not dispose of them in any way," and they "had an obligation to cooperate with the receiver" and "not hide [or] secrete . . . the assets held by either of them or Safari Media."

The Paintings

¶7 On July 25, 2000, the gallery shipped the three paintings Mark and Maryanne had purchased in April to Matt Farruggio, an unknown third person, who then placed them in storage. The owner of the gallery testified that Maryanne had asked him to ship the paintings to Farruggio because of "some trouble at her house." In late September or early October 2000, the Chisholms met with the gallery owner from whom they had purchased the three paintings, explained that "their company was in a lot of trouble," and asked for his assistance in selling the paintings as soon as possible. Also in early October, Lisa Hubble, a Safari investor, visited the Chisholms in response to Maryanne's requests by electronic mail for financial help. Hubble was accompanied by a friend, Chris Palaia. During the visit, Hubble agreed to lend the Chisholms $42,500 for legal fees to be secured by two of the three paintings. In turn, the Chisholms agreed to make an initial repayment to Hubble of $20,000 the following month. The four—Palaia, Hubble, and the Chisholms—also agreed to establish a limited liability company to hold the third painting for five years, sell it, and then share the profits. Hubble testified that the company, QEAA, was to be a "representational company for us to sell the art because Maryanne and Mark didn't want the State to know the artwork was involved."

¶8 Pursuant to these agreements, Maryanne drafted a letter, signed by her and Mark, stating that they had transferred ownership of the paintings to Hubble on June 15, 2000. In response to Hubble's question about the erroneous date, Maryanne replied she was

"afraid" of the receivership. And, shortly thereafter, Maryanne completed an auction request form at an auction house in an attempt to sell the two paintings held by Hubble, claiming that ownership of the paintings had been transferred to QEAA on June 15, 2000. Then, in mid- to late October, the Chisholms shipped the three paintings from the storage unit in Tucson to a storage unit in Hollywood, California, putting on the storage lease agreement the name of the woman who had taught the Chisholms' children. The children's teacher testified she did not know her name was on the lease and was not involved in the transfer of the paintings. Maryanne wrote Hubble they had taken these latest actions for "safety." At the end of October, the Chisholms filed for bankruptcy but failed to list as assets, as required, either the three paintings or the Tempe property.

¶9 In early 2001, Palaia corresponded with Maryanne by electronic mail, asking if he could visit the storage unit to see the paintings. Maryanne responded that Palaia should not have included their names or other information about QEAA and the paintings in his message in order to protect the paintings from the receivership. Palaia, suspecting the Chisholms of wrongdoing, informed the special investigator for the ACC working on the Chisholms' case about the three paintings. That investigator informed the receiver, who in turn informed the bankruptcy trustee, and the trustee secured a court order to seize the three paintings. On January 12, 2001, at a hearing in bankruptcy court in which the Chisholms were to disclose assets and be available for questioning by creditors, Maryanne testified that

the three paintings were "stored in a safe place but it is no longer our property and has not been since June."

The Tempe Property

¶10 In July 2000, the receiver first learned about Mark's purchase of the house in Tempe. When the receiver discovered that Safari funds had been used to buy the house, which qualified it as a receivership asset, he sent a letter to the Chisholms' attorney asking if Mark would stipulate to transfer the property to the receivership. On August 21, their attorney sent them a letter notifying them of the stipulation request. On August 29, Mark quitclaimed the property to Mark Tynan, and the deed was recorded in early September. On October 4, 2001, while executing a search warrant on the Chisholms' home, a special investigator for the ACC found the August 21st letter from the Chisholms' attorney, together with the receiver's letter about the Tempe property, inside a box of Mark's legal papers. An inspection of those papers found handwritten notations in the margins of the receiver's letter.

¶11 On January 5, 2001, after learning the Tempe property had been transferred to Tynan, the receiver wrote to Tynan demanding he transfer the property to the receivership, which Tynan eventually did in December 2001. And, in October 2001, after some bankruptcy issues had been resolved, the receiver petitioned the court to hold Mark in contempt for transferring the property to Tynan. At the contempt hearing in December 2001, both Mark and Maryanne testified they did not receive the letter of August 21, 2000, informing them the receivership was claiming the Tempe property. They also claimed not

to have seen any of the orders related to the receivership until November 2000. Mark testified he was otherwise unaware the receivership had claimed the property and believed he had already transferred the house to Tynan in February 2000 but executed the quitclaim deed so Tynan could refinance his mortgage on the home.

¶12 The court held Mark in contempt for violating the receivership order and held both the Chisholms in contempt for falsely testifying at the contempt hearing, finding they had received notice of the receivership orders on the day they were issued, June 30, 2000; their attorneys had explained the unambiguous directives of the orders to them prior to August 29, 2000; and they had been untruthful when claiming they had not had notice of the orders. The Chisholms stipulated to the entry of the contempt order. In April 2002 and January 2003, based on their actions involving the three paintings and the Tempe property, a Pima County grand jury indicted them for conspiracy to commit theft, perjury, and fraud in insolvency and for four counts of fraud in insolvency. After a bench trial, the court dismissed two of the fraud counts and found them guilty of the remaining charges. This appeal followed.[1]

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[1]Before addressing the merits of the appeal, we are compelled to comment on the form of the briefs Mark filed. The opening brief is miscaptioned, and neither brief contains citation to any cases or authorities, except two statutes—one of which is not relevant to any issue before us. Neither brief contains the applicable standard of review for the arguments raised. And Mark fails to support the statement of facts in the opening brief with any appropriate citations to the record, citing only a memorandum prepared for trial. Although Mark claims he attached that memorandum to his opening brief, that memorandum was not attached, and Mark does not state where that memorandum can be found in the record on appeal. In short, Mark's briefs fail to comply with the rules of criminal appellate procedure.

SUFFICIENCY OF EVIDENCE

Fraud in Insolvency

¶13 Mark argues there was insufficient evidence to support his convictions on all charges. He moved for judgment of acquittal at the close of the state's case and renewed his motion at the close of all the evidence, but the court denied both motions, finding there was substantial evidence to support the charges. *See* Ariz. R. Crim. P. 20(a), 17 A.R.S. (court must grant judgment of acquittal "if there is no substantial evidence to warrant a conviction"). Substantial evidence is such "that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). Thus, "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction" requires an appellate court to ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89 (1979).

See Ariz. R. Crim. P. 31.13(c), 17 A.R.S. That failure provides sufficient cause for dismissal of Mark's appeal. But, "since we remain inclined to decide cases on their merits and not to punish litigants because of the inaction of their counsel," we nonetheless address the merits of Mark's claims. *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966). We strongly caution counsel to follow the requirements of the rules of appellate procedure when appearing before this court.

¶14 To address Mark's claim as to his convictions for fraud in insolvency, we must determine whether the state presented substantial evidence that (1) a receiver, "entitled to administer property for the benefit of creditors," had been appointed and (2) Mark knowingly misrepresented or refused to disclose to the receiver "the existence, amount or location of the [receivership] property or any other information which he could be legally required to furnish to such administration." A.R.S. § 13-2206(A)(3). Mark does not dispute that a receiver had been appointed. But he maintains the state presented insufficient evidence that he concealed from the receiver the existence of three valuable paintings and property located in Tempe, the respective allegations underlying his two convictions for fraud in insolvency.

¶15 The state presented evidence that the receiver was entitled to claim the three paintings as receivership property because they were purchased with funds taken either directly or indirectly from Safari accounts. The state also presented ample evidence Mark either knowingly misrepresented or refused to disclose the location of the paintings. Mark and Maryanne purchased the paintings in April 2000, well after the ACC had begun investigating their corporation for securities fraud in 1999. After the receivership and restraining orders were entered on June 30, 2000, Mark and Maryanne shipped the paintings to a third party who placed them in a storage unit in Tucson, then later shipped them to another storage unit in California with their children's teacher's name on the lease, unbeknownst to the teacher. Although Lisa Hubble did not agree to lend the Chisholms

money for legal fees in exchange for the paintings until October 2000, Mark and Maryanne signed a letter in which they claimed to have transferred ownership of two of the paintings to Hubble on June 15, 2000, two weeks before the receivership and restraining orders were issued. The Chisholms also established a "representational company" named QEAA in order to hold the third painting for five years, sell it, and share the profit among the four members of QEAA. During this entire sequence of events, the Chisholms never informed the receiver they owned the paintings.

¶16 Taken together, and viewed in the light most favorable to the state, those facts demonstrate that the Chisholms undertook repeated efforts to conceal the existence of the paintings from the receiver. And, once the receiver discovered their existence, the evidence demonstrated that the Chisholms attempted to mislead the receiver as to when those paintings had been allegedly conveyed to a third party. Thus, the state presented sufficient evidence from which the trial court could have reasonably concluded beyond a reasonable doubt that Mark committed fraud in insolvency as to the paintings.

¶17 In support of the second conviction, the state produced evidence that Mark attempted to conceal his ownership of the Tempe property and his conveyance of it to avoid the receivership. Before trial, Mark stipulated to the court's order finding him in contempt for transferring the property to Tynan by quitclaim deed on August 29, 2000, several months after the receivership was created. Mark also stipulated he had testified falsely about having no knowledge of the receivership orders at the time he signed the quitclaim deed. Moreover,

circumstantial evidence corroborated that, contrary to Mark's initial claims, he was well aware of the existence of the receivership when he conveyed the Tempe property. The state presented evidence that it had discovered in Mark's office a letter from his attorney dated August 21, 2000. That letter alerted Mark that the receivership was claiming the Tempe property. And it specifically suggested that Mark stipulate to turning the property over to the receivership. Yet Mark transferred the property to Tynan by quitclaim deed eight days after his attorney sent the letter. From this evidence, the trial court could reasonably have concluded Mark knowingly concealed the existence of the Tempe property from the receiver.

Conspiracy to Commit Theft, Perjury, and Fraud in Insolvency

¶18 Section 13-1003(A), A.R.S., provides:

> A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense . . . .

The court found the objects of the conspiracy here were theft, fraud in insolvency, and perjury. If we find the evidence was sufficient to support a conspiracy on one of the objects, we need not discuss the other alleged objects. *See State v. Willoughby*, 181 Ariz. 530, 545, 892 P.2d 1319, 1334 (1995).

¶19 We have already found the evidence was sufficient to support the fraud in insolvency charges; we also conclude the evidence was sufficient for the trial court to have

found that Mark conspired with Maryanne to commit that offense. The state presented evidence that Mark and Maryanne acted in concert when they failed to disclose the existence of the paintings. Mark used his personal credit card to pay for the paintings, both their names were on the shipping invoice, they both met with the gallery owner to discuss selling the paintings, they both signed the letter falsely claiming they had transferred the paintings in June, and they both agreed to form QEAA to hold the third painting. This was sufficient evidence from which the court could have concluded beyond a reasonable doubt that Mark had conspired with Maryanne to commit fraud in insolvency by refusing to disclose the existence of the paintings and that they had agreed to take actions in furtherance of that offense. Because we have already determined there was sufficient evidence that Mark's actions relating to the paintings constituted fraud in insolvency, he clearly committed an "overt act in furtherance of the offense." § 13-1003(A). Therefore, there was sufficient evidence of each element of the offense of conspiracy to support the trial court's verdict.

¶20 Finding no error, we affirm.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge